In the Supreme Court of the United States.

OCTOBER TERM, 1921.

IN THE MATTER OF THE EASTERN SHORE SHIPBUILDING CORPORATION, BANKRUPT.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, representing the United States of America, Petitioner,

v.

ROGER B. WOOD, TRUSTEE IN BANKRUPTCY.

No. ——.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT.

Comes now the Solicitor General, in behalf of the United States Shipping Board Emergency Fleet Corporation, and respectfully prays for a writ of certiorari to review the final decree of the United States Circuit Court of Appeals for the Second Circuit which affirmed a final order of the United States District Court for the Southern District of New York in the above-entitled cause.

QUESTIONS PRESENTED.

1. The main question presented is, Whether the United States Shipping Board Emergency Fleet Corporation, a corporation created under authority of an Act of Congress and exercising only powers expressly delegated to it by the President, is such an agency of the United States as to entitle it to governmental priority in the distribution of a bankrupt's estate, or whether it must participate in such distribution upon an equality with all other creditors.

2. A second question suggested by the Court of Appeals but not decided by it, for the reason that such decision was rendered unnecessary by its answer to the first question, is, Assuming that the Fleet Corporation may assert such rights to priority as are possessed by the United States, do such rights extend to ordinary commercial debts or are they limited to claims for taxes?

STATEMENT OF THE CASE.

The Fleet Corporation on August 22, 1918, entered into a contract with the Eastern Shore Shipbuilding Corporation for the construction of six wooden harbor tugs for the United States. The contract price of the tugs was $145,000 each, to be paid in ten equal instalments as the work progressed. On March 20, 1919, the Eastern Shore Shipbuilding Corporation was adjudicated a bankrupt and Roger B. Wood, respondent above, was appointed trustee. At the time of the adjudication none of the six tugs was ready to launch, and although $428,017.72 had been advanced by the Fleet Corporation to the Eastern

Shore Corporation, the tugs were appraised to be worth only $100,000. The Fleet Corporation thereupon filed its claim for the difference between the amount advanced and the appraised value of the tugs—$328,017.72—which was duly allowed. Priority of payment, however, was denied by the referee on the ruling that a debt owing the Fleet Corporation is not a debt owing the United States within the meaning of the Bankruptcy Act.

Upon a petition for review District Judge Mayer, of the Southern District of New York, sustained the order of the referee, and on appeal to the Circuit Court of Appeals, Judge Mayer's decision was affirmed. The Circuit Court of Appeals held, in substance, that the Fleet Corporation's business was not "peculiarly governmental" but was "commercial and industrial," and that "its powers were not essentially different from those possessed by private corporations." "We think," said the Court, "that no provision can be found either in the Acts of Congress or in the charter of the company giving to the corporation or its stockholders any rights, privileges or obligations different from those possessed by any other corporation formed under the laws of the District of Columbia with respect to its business." (Rec., 181.)

REASONS FOR ALLOWANCE OF WRIT.

1. The underlying question involved in the case—the status of the Fleet Corporation as an agency of the United States—is involved in other cases now on the docket of this Court and a writ of *certiorari* should issue to preserve rights pending the final determination of such question. (*Infra*, p. 5.)

2. The underlying question is one in reference to which there exists a clear conflict of decision among the several circuits; hence a writ of *certiorari* should be granted pending decision of such question by this Court in cases already on the docket in order to insure uniformity of decision. (*Infra*, p. 6.)

3. The question presented is of interest to a large number of persons since it is involved in one aspect or another in more than a hundred cases now pending in the courts of the country, both State and Federal, and the final determination of the question in this and other cases now on the docket will affect all such cases. (*Infra*, pp. 6–7.)

4. The case is one of unusual public importance since the effect of the decision of the Circuit Court of Appeals, if unreversed, will be to render the Fleet Corporation liable in cases (including cases in tort) in which all other governmental agencies are immune, and will have the further effect to render the Fleet Corporation subject to state taxation and regulation. (*Infra*, p. 7.)

5. Error has been committed. (*Infra*, p. 7.)

CONCLUSION.

Wherefore, it is respectfully submitted that a writ of *certiorari* should issue in this case.

September, 1921.

JAMES M. BECK,
Solicitor General.
GUY D. GOFF,
Assistant to the Attorney General.
ABRAM F. MYERS,
Special Assistant to the Attorney General.

BRIEF.

I.

Question involved in pending cases.

The underlying question in this case, as to the status of the Fleet Corporation, has been raised in a large number of cases and in a variety of ways. It is directly involved in three cases now on the docket of this Court, viz.: *Sloan Shipyards Corp.* v. *Fleet Corp.*, No. 308; *Astoria Marine Iron Works* v. *Fleet Corp.*, No. 376; *Fleet Corp.* v. *Sullivan*, No. 355. The *Sloan Case* and the *Astoria Case* present the question whether a suit against the Fleet Corporation is a suit against the United States, and consequently whether such a suit can be maintained in a court in which the United States has not expressly consented to be sued. The *Sullivan Case* involves an attempt by the Workmen's Compensation Commission of Pennsylvania to make an award against the Fleet Corporation in favor of one of its employes for personal injuries. The underlying question involved in those cases, therefore, is the same as in the case at bar.

It is the purpose of the Solicitor General to move to advance all these cases for hearing together at an early date convenient to the court.

II.

Conflict of decision.

There is a clear conflict among the lower Federal courts on the question of the public status of the Fleet Corporation. Thus three District Courts have held that the Fleet Corporation is such an agency of the United States that a suit against it is a suit against the United States and can not be maintained in any court in which the United States has not expressly consented to be sued: *Sloan Shipyards Corp.* v. *Fleet Corp.*, D. C. W. D. Wash., 268 Fed. 624 (on rehearing, 272 Fed. 132); *Astoria Marine Iron Works* v. *Fleet Corp.*, D. C. Ore., 270 Fed. 635; *Keeley* v. *Kerr*, D. C. Ore., 270 Fed. 874; *Southern Bridge Co.* v. *Fleet Corp.*, D. C. S. D. Ala., 266 Fed. 747. While in the following cases it was held that the Fleet Corporation is subject to suit wherever service can be effected, in the same way as any private corporation: *Lord & Burnham* v. *Fleet Corp.*, D. C. N. D. Ill., 265 Fed. 955; *Gould Coupler Co.* v. *Fleet Corp.*, D. C. S. D. N. Y., 261 Fed. 716; *Finance Corp.* v. *Landis*, D. C. E. D. Pa., 261 Fed. 440; *Ingram Day Lbr. Co.* v. *Fleet Corp.*, D. C. S. D. Miss., 267 Fed. 283.

III.

Importance of question involved.

The importance to a large class of persons of the precise question involved, without reference to the broad underlying question, was expressly recognized by the Circuit Court of Appeals. (Rec., 172.)

As shown by the records of the Department of Justice, there are now pending in the different courts of the country more than a hundred separate cases involving the same general question as the present case and which will be controlled by a final decision herein and in the three other cases now on the docket.

The importance of the question is emphasized by a consideration of the far-reaching consequences of the decision of the Circuit Court of Appeals. If the pronouncement that the Fleet Corporation has no other status than that of a private corporation shall stand, then it would follow not only that the Fleet Corporation may not have preference in bankruptcy proceedings, but that its property may be made subject to seizure at the instance of private parties. Other results which would logically follow are (a) that the Fleet Corporation would be suable in all courts, both State and Federal (*Haines* v. *Lone Star Co.*, 268 Pa. 92); (b) that it would be suable in tort as well as in contract (*American Cotton Oil Co.* v. *Fleet Corp.*, D. C. E. D. La., 270 Fed. 296); and (c) that it would be subject to state taxation and regulation (see *Sullivan Case, supra*).

It is submitted that a decision of such far-reaching consequences should be reviewed by this Court.

IV.

Error has been committed.

As set forth in the opinion of this Court in *The Lake Monroe*, 250 U. S. 246, the Fleet Corporation was formed by the United States Shipping Board

under the laws of the District of Columbia pursuant to a general authorization contained in the Shipping Act of 1916 (39 Stat. c. 451, p. 728).

It may be, as decided by the Circuit Court of Appeals, that the Act of 1916 contemplated the formation of a purely private corporation having no sovereign prerogatives. Where that court erred was in failing to find and give controlling effect to the fact that the Fleet Corporation was not formed for the purposes of that act and never functioned thereunder. Prior to the declaration of war the Shipping Board had exercised none of its powers under the Act of 1916 in respect of the acquisition and operation of merchant vessels and had not organized any corporation to act as its agent. It was not until after the declaration of war that the Fleet Corporation was organized to become the agent of the President to execute the powers and duties which were to be conferred on him in respect of shipping, and until it was commissioned as such agency, it never functioned.

By the Emergency Shipping Provision of June 15, 1917 (40 Stat. c. 29, p. 182), the President was invested with broad powers to "purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed," etc. On July 11, 1917, the President made an Executive Order directing that the Fleet Corporation should have and exercise all power and authority vested in him by said provision, so far as applicable to the construction of vessels, the pur-

chase or requisitioning of vessels in process of construction, and the completion thereof. The powers conferred on him with respect to the acquisition of completed ships he delegated to the Shipping Board.

It was under this delegation of governmental power, and under it alone, that the Fleet Corporation functioned from the date of its formation down to the passage of the Merchant Marine Act of June 5, 1920 (41 Stat. c. 250, p. 988). During that period the Fleet Corporation could have no other capacity than that of a governmental agency, nor did it.

The Circuit Court of Appeals gives much weight to the decision of this Court in *United States* v. *Strang*, 254 U. S. 491, where it was held that the Fleet Corporation and the United States are separate entities, and that an agent of the former is not an agent of the latter within the meaning of Section 41 of the Criminal Code. The case is not in point, however, since it has not been contended that the United States and the Fleet Corporation are not separate entities. The point is, that while the Fleet Corporation and the United States are separate entities, the former has no capacity except as agent of the latter, and the general rule that a debt due from or to an agent of the Government is due by or to the Government applies.

There is no ground for the second question suggested by the Circuit Court of Appeals (*supra*, p. 2) in view of the broad language of section 3466 of the Revised Statutes, providing that in all cases of in-

solvency "debts due the United States shall be first satisfied." But even if the question admitted of doubt, that would only be an additional reason for allowing the writ, because of the public interest involved.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
GUY D. GOFF,
Assistant to the Attorney General.
ABRAM F. MYERS,
Special Assistant to the Attorney General.

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Petitioner,

vs.

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Trustee in Bankruptcy.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROSENBERG, BALL & MARVIN,
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BRIEF IN OPPOSITION TO PETITION FOR A CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The underlying question in this case is whether under the facts here presented a debt due from the bankrupt to the United States Shipping Board Emergency Fleet Corporation is one for which the United States may claim priority under the provisions of the Revised Statutes and of the Bankruptcy Act of 1898. The question is a narrow one and is not involved in the several cases now on the docket of this Court. There is no

other decision on this question and therefore no conflict. The principles underlying the decision in *U. S.* vs. *Strang*, 254 U. S., 491, are controlling in favor of the decisions already rendered in the instant case and make the granting of the writ of certiorari wholly unnecessary.

Statement of the Case.

On August 22, 1918, the bankrupt and the Fleet Corporation entered into a contract for the construction of six wooden harbor tugs. The contract price was $145,000 for each tug, to be paid in ten equal instalments. The contract is made by the Fleet Corporation in its own name. Throughout the contract (R-page 100), the Fleet Corporation is referred to as the "Owner" and the provisions of the contract carefully discriminate between the "Owner" and the "United States of America." For example:

(*a*) Title to all vessels, either completed or under construction, in so far as inspected, was to be in the "United States of America," but title to all material for the furtherance of the work was to be in the "Owner" (fol. 345);

(*b*) Time for performance was to be extended if the work was delayed through neglect of the "Owner" or alterations and additions by the "Owner" or the commandeering by the United States Government of materials (R.-fol. 335);

(*c*) Insurance was to be payable to the "Owner" and the contractor as their interests may appear (fol. 334);

(*d*) The work was to be carried on by the contractor will all possible dispatch, subject to prior

rights, if any, of a department of the "United States of America."

On March 19, 1919, the Eastern Shore Shipbuilding Corporation was adjudicated a bankrupt. At that time there had been advanced by the Fleet Corporation to the bankrupt the sum of $428,-017.72. The Fleet Corporation took away the incompleted vessels and their value has been fixed at $100,000 and for the difference—$328,017.72—the claim of the Fleet Corporation has been allowed, but priority in payment has been denied.

The petition as originally filed was in part one for reclamation of materials that had been furnished and the petition alleged title to such materials in the Fleet Corporation in pursuance of the provisions of the contract above referred to (R.-fol. 14). As the material was not identified, the proceeding became one for general priority. The petition for reclamation or proof of claim was not, and of course could not be, in the name of the United States, for under the very provisions of the contract the United States had no title to the material but only to the finished vessels. It was only after the decision of the Referee that the petitioner commenced to describe itself as representing the United States of America (R. fol. 443) with the thought evidently that this declaration could in some wise change the true status of the corporation and thus make the debt due the United States.

The Circuit Court of Appeals in affirming the order denying priority, held that the debt due the Fleet Corporation was not in law a debt due the United States and found that the debt was due to the Fleet Corporation as a principal.

I.

The determination of the questions involved in the cases pending in this Court will not determine the question presented in this case.

As indicated, the sole question here is whether the United States may brush aside the corporate entity of the Fleet Corporation and assert ownership of a debt due the Fleet Corporation where the Fleet Corporation contracted in its own name as the "Owner" and where the agreement provides that title to the materials shall be in the Fleet Corporation as distinguished from the United States, and by other provisions indicates that it has rights separate and distinct from those of the Government.

These questions have been answered by the Circuit Court of Appeals against the Government. Because of this decision it is not at all necessary to arrive at the omnibus conclusion that the United States under every state of facts would have no sovereign rights in a suit against the Fleet Corporation or would have no immunity from State taxation, or from those State restrictions which are imposed upon strictly private corporations which in no sense are instrumentalities of Government. It may be on the facts disclosed in other cases that the transactions there involved were such that a suit against the Fleet Corporation would be a suit against the United States, or that an attempt to impose State taxes or State restrictions would be an unlawful interference with the operation of the corporation; but those problems are wholly distinct from the single one which is involved in the case at bar and involve other principles and other statutes.

II.

The principles underlying the decision in United States vs. Strang, 254 U. S., 491, are controlling in favor of the decision below.

In the Strang case it was held that an employee of the Fleet Corporation who, on behalf of the Fleet Corporation, gave orders for merchandise to a firm of which he was a member did not violate the provisions of Section 41 of the Criminal Code which makes it a criminal offense for the officer or agent of a corporation or a firm to act as an officer or agent of the United States in the transaction of business with such firm.

There as here the Government attempted to brush aside the corporate entity and to obtain a ruling that contracts of the Fleet Corporation were contracts of the United States and that agents of the former were the agents of the latter. The synopsis of the Government's argument found at page 3 of its brief in that case reads as follows:

> "The Government's contentions may be thus summarized:
>
> 1. The defendant Strang in doing the act set out in the indictment was an agent of the United States.
>
> (*a*) The United States Shipping Board Emergency Fleet Corporation (hereinafter called the Fleet Corporation) is an agency or instrumentality of the United States.
>
> (*b*) It was formed solely as an arm of the United States for the execution of purely Governmental powers and duties vested by Congress in the President and by the President delegated to it.

(*c*) The acts of the Fleet Corporation within the scope of its delegated authority are the acts of the United States as are the acts of any other regular constituted agency or instrumentality of the Government.

(*d*) Wherefore the defendant Strang in placing orders with the Duval Company on behalf of the Fleet Corporation necessarily acted as an agent of the United States.

2. The acts charged in the indictment are within the mischief aimed at by the statute.

(*a*) Section 41 of the Criminal Code was designed to prevent frauds on the United States due to collusion between its agents and those with whom they transact business.

(*b*) The assets and property of the Fleet Corporation are the assets and property of the United States.

(*c*) Any fraud against the Fleet Corporation would be a fraud against the United States.

(*d*) Wherefore the acts charged in the indictment are directly within the mischief aimed at by Section 41."

These arguments were rejected, and this Court refused to consider the Fleet Corporation other than a distinct legal entity and refused to consider its agents agents of the United States. and refused to consider the assets and property of the Fleet Corporation the assets and property of the United States. If this Court had found that Strang, the agent of the Fleet Corporation, had executed the contract for the United States rather than for the Fleet Corporation, the indictment would have been upheld. The contrary ruling necessarily leads to the conclusion that contracts

made by the Fleet Corporation are its contracts and obligations arising thereunder are under insolvency laws due to it and not to the United States.

The attempted distinction now urged in the Government's brief in support of the present petition, that the Fleet Corporation has no capacity except as agent of the United States, is refuted by the very language of the Company's charter (R., fol. 283) and by the provisions of the contract with the bankrupt which vests in the corporation as such title to property and vests in it rights distinct from those vested in the United States.

Furthermore the government's contention overlooks the fact that the gross assets of the Fleet Corporation which include the debt due from the bankrupt belong to the Fleet Corporation as a distinct entity and that only the net assets of the corporation are payable to the United States when the corporation is dissolved.

In determining to whom the debt of the bankrupt is due, the fundamental fact must be borne in mind that there is no statute requiring that money received by the Fleet Corporation from its various activities shall be paid into the United States Treasury as and when received, or that they be held for its account. The gross receipts of the Fleet Corporation are not trust funds which are ear-marked and which must be turned over to the Government. Under Section 11 of the said Act of 1916, it is the "property of the corporation" then extant, its net assets after the payment of expenses, etc., which, after dissolution of the corporation, are payable to the Shipping Board and it is only the net proceeds derived by the Shipping Board which thereafter are to

be paid to the Treasury under Section 13 of the Merchant Marine Act of 1920.

Among the gross assets of the Fleet Corporation is the debt due from the bankrupt. If and when such a debt is collected, the proceeds will not be a trust fund which belongs, as such, to the United States, but title thereto will be in the corporation and such proceeds will be available for the general corporate purposes, many of which at the present time are purely commercial. Under these circumstances, from both a legal and practical point of view, the debt due from the bankrupt is one due to the Fleet Corporation and not to the United States.

As the debt is due to the Fleet Corporation, there cannot be found in the Statutes any provisions for the prior payment of the debt over the debts of general creditors and in the absence of the clearest Congressional declaration that debts due to the Fleet Corporation are to receive priority, it is submitted that a ruling to that effect would be contrary to the principles and purposes underlying the bankruptcy statute, namely, equal distribution amongst the creditors.

III.

The application should be denied.

Respectfully submitted,

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Solicitors for Roger B. Wood,
Trustee in Bankruptcy.

GODFREY GOLDMARK,
Of Counsel.